

JAN 07 2008

Moore v. United States
No. 05-16824

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

BEA, Circuit Judge, concurring in part and dissenting in part:

I concur with the majority's holding affirming the grant of defendant's unopposed motion for summary judgment. I part ways with the majority, however, in its reversal of the district court's denial of plaintiffs' motion for relief from judgment. We review a denial of a motion for relief from judgment under Federal Rule of Civil Procedure 60(b) for abuse of discretion. *Fantasyland Video, Inc. v. County of San Diego*, 505 F.3d 996, 1005 (9th Cir. 2007). The majority fails to grant the trial court's ruling the deference the abuse of discretion standard requires.

The majority contends the district court "erred" by failing to hold that, under our decision in *Community Dental Services v. Tani*, 282 F.3d 1164 (9th Cir. 2002), plaintiffs have demonstrated "extraordinary circumstances which prevented or rendered [them] unable to prosecute" their case, entitling them to relief under Rule 60(b)(6)'s catch-all provision. *Id.* at 1168 (citation omitted). Yet, plaintiffs never argued in the district court they were entitled to relief under subsection (b)(6); indeed, they do not do so here. The only people who so argue are the majority, and as an original proposition on appeal.

Appellants certainly never argued their counsel's conduct was grossly negligent such that counsel "virtually abandoned" them. *See id.* at 1170. Quite the

opposite: plaintiffs always contended their failure to oppose the motion was the result of “mistake, inadvertence, surprise, [and] *excusable* neglect” under Rule 60(b)(1) (emphasis added). Moreover, although counsel’s failure to file an opposition to defendant’s motion for summary judgment is inexcusable, the circumstances here are not so similar to *Tani* that the district court abused its discretion by failing to conclude plaintiffs’ counsel “virtually abandoned” the plaintiffs.

We cannot say the district court abused its discretion in failing to adopt an argument plaintiffs never made, nor should we reverse a district court based on an argument that has been waived on appeal. Accordingly, I would affirm the district court’s order denying plaintiffs’ motion for relief from judgment.